United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-1611

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1611

REA EXPRESS, INC.,

Petitioner,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

ON PETITION FOR REVIEW OF ORDERS
OF THE CIVIL AERONAUTICS BOARD

BRIEF FOR PETITIONER REA EXPRESS, INC.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC., Petitioner, -against- CIVIL AERONAUTICS BOARD, Respondent.	No. 74-1611

BRIEF FOR PETITIONER REA EXPRESS, INC.

INTRODUCTION

This appeal by REA Express, Inc. ("REA") challenges several orders*/ of the Civil Aeronautics Board**/ ("CAB" or the "Board") which, taken together have decreed the termination of Air Express effective July 31, 1974. By order of this Court dated July 16, 1974, the Board's orders have been stayed

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*/ The orders appealed from include:

Docket No. 22388 Express Service Investigation, Opinion and Order (73-12-36) and Supplemental Opinion and Order (74-5-25); Docket No. 22387 Investigation of Air Express Rates, Order (74-5-23) and Order (74-5-24, denying consolidation); and Docket No. 26238 Discussions Concerning Industry-Wide Priority Air Cargo Service, Order Authorizing Discussions (74-2-118), Order on Reconsideration (74-4-1) and Order (74-5-74).

**/ Chairman Timm, Vice Chairman Gillilland and Member Minetti concurred in the Opinion and Order (73-12-36) which is the primary focus of the present proceeding. Members West and O'Melia did not participate.

pending judicial review thereby permitting REA to continue the Air Express Service which it has successfully offered for the past forty years.

PRELIMINARY STATEMENT

REA invokes this Court's statutory review jurisdiction to arrest the CAB's effort to put a summary end to REA's unique and vital priority air service oriented to small shipments which has operated past July 31 under this Court's stay mandate, entered over the CAB's strenuous opposition. This Court's reversal of the Board's extra-statutory and unsupported orders arising from its strangely subdivided and speculative proceedings is the only means of preventing the "termination with extreme prejudice" of REA's 40-year-old Air Express business, REA's corporate future, and the livelihoods of thousands of REA employees.

Under an admittedly unique set of agreements approved by the CAB, REA and the airlines over the years have fashioned a singular priority air transport concept particularly suited to the needs of small shippers, light traffic points and unusual commodities. As undisputed by the Board, the REA/airline partnership alone permits such shipments to move on a nationwide, intermodal basis under a single REA document and simple tariff. Because REA is centrally responsible for claims, ground handling, pick-up and delivery and interline expedition, as well as pro-

motion of Air Express, the administrative costs of air express service are substantially lower than those of any other intermodal movement involving air.

In small shipments, shipments from light traffic points and shipments of commodities requiring special handling, where priority is needed or where the cost of administration is substantial relative to the cost of carriage, the economic advantages of Air Express have won REA the overwhelming loyalty of the shippers appearing before the Board and this Court, and have permitted the development of air traffic which would otherwise move by other modes. REA's Air Express service has effectively balanced the other indirect air services, air cargo and air freight forwarding, which depend on holding for consolidation and are oriented to large shipments, moving long distances in dense markets.

While purporting to engage in a comprehensive examination of the "public interest" in Air Express service, the CAB never bothered to consider (much less evaluate) the critical economic function of the unique Air Express transport concept. Instead, the economic issues were shunted off to a still undecided "Rates" case, and the Board limited its consideration to whether certain reforms in Air Express sought by REA should be granted or whether the service should be expunged.

Rejecting REA's reform proposals largely on the grounds of competitive opposition, the Board diagnosed REA as a sick

carrier and prescribed euthanasia. The Board's decision rationalized this flouting of shipper interests by attempting to show that alternative service might someday become available for all points and all commodities now carried by Air Express. In so doing, the CAB showed no hesitancy in overturning its own Administrative Law Judge's contrary findings of record by speculating on what might develop absent REA Air Express. And not surprisingly, the Board's utter failure to even explore what these nonexistent alternative services might cost forced it to ignore the overwhelming weight of shipper testimony and interests.

The Board also attempted to offer its condolences to REA by giving it an opportunity to attempt a massive, irreversible and impossible shift into air freight forwarding on the very day Air Express terminated. At the same time, the Board neatly sidestepped REA/Airline rate division issues which it had promised this Court it would consider*/ and which could have resulted in enhancing REA's financial position by as much as 50 million dollars.

Finally, forced to recognize that termination of REA Air Express would leave shippers without any priority air tariff, and acknowledging a priority tariff to be absolutely essential

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*/ In seeking to moot REA's original appeal from its inadequate formulation of the issues relevant to Air Express, the Board affirmatively committed itself to determine the issue of retroactive rate divisions between REA and the airlines. REA Express, Inc. v. CAB. (No. 35474, 2d Cir. 1970).

for adequate air transport service, the Board announced its "intention" to require the airlines to develop priority interline tariffs. The actual development of this replacement service was consigned to secret discussions between the airlines, with the door barred to REA and vitally concerned shippers, and the "results" were not permitted to be considered in the Air Express Service investigation. More than six months after the Board's grandiose announcement, the promised priority replacement has not even been proposed.

The Board's response to REA's efforts to seek CAB reform of the air express arrangement was totally inconsistent with the explicit dictates of the Federal Aviation Act of 1958, a controlling statute which appears to have played no role in the Board's analysis. Under the Act, the Board is obligated to consider "the promotion of adequate, economical, and efficient service by air carriers at reasonable charges," "the encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States," and "the need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service." The Board decisions at issue here, which totally ignored the economic issues and the needs of shippers cannot be squared with those statutory directives.

Moreover, the Board's perverse notion that REA's weakened financial condition required a termination of the business REA had pioneered and which accounted for 40 percent of its cash flow, not to mention a headlong and suicidal plunge into air freight forwarding, turned the Board's statutory responsibility to "foster sound economic conditions" on its head.

Finally, the Board's free floating speculative approach to the vital issues of geographic and commodity coverage and its cavalier disregard of the need for any comparative showing on priority service alternatives, not only disregard the statutory requirement that Board action be supported by "substantial evidence" but also infringe on REA's basic due process right to meet the evidence purporting to sustain the CAB's death warrant for Air Express.

In sum, the CAB orders now before this Court are without foundation in the controlling statute, the economics of air transportation, or the record before this Court. And the Board's adversary and unstructured approach to this proceeding requires both that its orders be set aside and that this Court set specific standards and procedures for the necessary post-remand proceedings.

ISSUES PRESENTED FOR REVIEW

1. Can the CAB, in conducting a "public interest" investigation into air express service, limit its consideration to selected adversary contentions and ignore the express relevant statutory "public interest" considerations?

2. Can the Board terminate Air Express service without reaching and deciding the pivotal statutory economic and rate issues critical to the viability of air express and its utility to shippers and air transport?

3. Can the Board satisfy its duty to "foster sound economic conditions" by extinguishing a unique transport concept rather than restoring Air Express service to financial health?

4. Can the Board disregard, or weigh against sheer speculation, the overwhelming shipper interest and testimony on REA's vastly superior geographic and commodity carriage, and simultaneously consign adequate replacement for REA's priority service to fruitless ex parte airline discussions?

STATUTES INVOLVED

The statutory provisions controlling the issues presented for review, 49 U.S.C. §§ 1301(3), 1302, 1382(b) and 1482(e), are set forth as an addendum to our brief for the Court's convenience.

STATEMENT OF THE CASE

Before discussing in detail the proceedings below, it is essential to describe briefly the special characteristics of each of the three types of federally regulated air cargo service.

A. Air Express and Complementary Types of Air Cargo Service

Any person wishing to ship cargo by air has three choices ostensibly available: (1) he may transport his cargo to the airport and ship via the air freight tariffs posted by the airlines; (2) he may turn his cargo over to an air freight forwarder who may consolidate his cargo with cargo of other shippers to be carried under the posted air freight tariffs; or (3) he may employ the special Air Express tariffs and priority, door-to-door service offered by REA. In fact, the underlying economics of each of these services differ widely so that the shipper's choice is effectively determined by the size of his shipment, the type of cargo involved, and other considerations such as the location of the shipper and the destination of his shipments.

Historically, the oldest form of shipment of cargo by air is the Air Express service which REA's predecessor, the American Railway Express Company, pioneered more than forty years ago.

This service offers a unique, low-cost, priority carriage on a nationwide basis. (J.A. 673(a)).

The economic key to Air Express service is the appointment of REA as the exclusive, coordinating agent for sales, ground, pick-up and delivery, administration and interline handling. With REA responsible for all administration and handling, "substantial economies" result which "can be passed on to the shipping public in the form of lower rates" (J.A. 621(a); 1815(a)). Thus, only a single shipping document is required for any given shipment, irrespective of the number of distinct carriers -- both air and surface -- actually participating in the movement. This, in turn, diminishes "accounting costs" because: (1) "collections from the shippers can be made by a single ground agency" and (2) "settlements between the air carriers are centralized and simplified." (Ibid.) Further economies occur due to cost savings from REA's nationwide pick-up and delivery services and from centralized terminal handling at major airports which enable airlines to deliver all incoming Air Express shipments to, and to receive all outgoing shipments

from, a single location at the airport. (J.A. 1791(a); 1799(a)-1804 (a); 1826(a)). As a result of these savings, Air Express has offered a simple tariff covering service to all points on a weight and mileage block basis, similar to postal rates.

The complex air freight tariffs which the airlines first began to offer in 1944 are in marked contrast to the simple, easy-to-compute Air Express fare. These air freight tariffs, available to all shippers tendering cargo for carriage at the airport, are steeply graduated, offering substantial "weight breaks" for large shipments. Consequently, the air freight tariff offered by airlines provides the most economic form of carriage only for very large shippers, able to take full advantage of the tariff "weight breaks" and having their own surface transportation capabilities for delivery and pick-up of cargo at the airport.

Under the airline tariffs, substantial cost savings are obtainable, however, from consolidation of shipments which allow many more shippers to take advantage of air freight tariff "weight breaks." Largely to provide this consolidation function, a new class of indirect air carrier, the air freight forwarder, was authorized by the CAB shortly after the publication of air freight tariffs by the airlines. Air Freight Forwarder Case, 9 CAB 473 (1948).

In contrast to REA's Air Express, which derives its economic advantage from savings in common pick-up and delivery

services, administrative and handling costs, air freight forwarders depend for their profits on the cost savings which result from consolidation of shipments under the existing air freight tariffs. These differences in economic function have, as the CAB recently explained to this Court, resulted in Air Express, air freight and air freight forwarders each serving separate and largely distinct types of customers:

> "In addition to offering broad geographic and commodity coverage, air express provides a relatively simple rate structure which is attractive for small shipments moving relatively short distances."
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> * * *
>
> "In comparison, air freight service, whether performed by air carriers directly or through air freight forwarders, primarily attracts comparatively larger shipments moving longer distance in denser traffic. Furthermore, the documentation for air freight is more complex, as is the rate structure. Air freight does not have the space priority right of air express, but air freight forwarders may utilize any air carrier they choose" (CAB Opposition to Stay 6).

The different types of customers served by REA Air Express and air freight forwarders are in large part a consequence of whether the savings in common pick-up and delivery, administration and handling reflected in the REA tariff outweigh the savings from freight consolidation by forwarders which might be achieved under the airlines' air freight tariffs. For at least four kinds of shipments, the savings and other advantages

offered by Air Express are so pronounced that these types of traffic are rarely handled by forwarders.

To begin with, a very substantial proportion of small shipment, short-haul service is handled by Air Express since for such shipments the cost of pick-up and delivery, administration and handling is relatively high in relation to the cost of air carriage. Thus, the average air express shipment "weighs only 27 pounds and moves 554 miles" (J. A. 1570(a); 1549(a)), while the average air freight shipment tendered to forwarders weighs about eighty pounds. After consolidation by forwarders, the average shipment handled by the airlines weighs approximately 300 pounds and moves over 1000 miles (J. A. 603(a); 1570(a); 1549(a)).

A second type of traffic in which REA specializes is shipments from light-traffic points throughout the country. Except where traffic is relatively dense, the freight consolidation function ordinarily provided by forwarders cannot be economically accomplished. But the simplified weight and mileage tariff offered by REA permits it to offer service from <u>each</u> of the 524 airport cities in the United States with pick-up and delivery service within substantial areas at most of these points included in the Air Express rate as part of the total service (J.A.607(a)). REA has far wider geographic coverage than any air freight forwarder (J.A. 606(a); 1686(a)-1689-(a)). Thus, air freight forwarders congregate in the large

metropolitan areas and are not even present at 200 or more of the nation's smaller airport cities. (J.A. 625(a)). In terms of traffic, only 3% of total Air Express shipments move between the top fifteen city pairs compared with 18% for the six largest air freight forwarders. (J.A. 1600(a)-1601(a)). Nearly 64 percent of all air express shipments are generated in smaller markets outside of the top 500 while only 18 percent are developed in the top 100 markets. (J.A. 600(a); 1602(a)).

Essentially the same economic circumstances explain Air Express' "virtually unlimited" commodity coverage. (J.A. 599(a)) Thus, REA handles the following unusual commodities which are not susceptible to the consolidation savings offered by forwarders: human remains, antiques, works of art, live animals, human blood, eyes to eye banks, radioactive substances, firearms, corrosive chemicals, explosives, precious metals and coins and currency and Top Secret materials for the Department of Defense. Even in the very few instances in which some of these commodities are handled by forwarders, the conditions of carriage are not uniform and a potential shipper must search out a forwarder who will transport his particular shipment to the desired destination. (J.A. 609(a); 1591(a)-1597(a); 912(a)-1057(a); 1610(a)-1644(a); 1360(a)-1369(a); 1358(a)-1359(a)).

A fourth and final advantage available to shipments moved by Air Express is the extremely rapid handling and delivery made possible by REA's coordinated ground handling and the fact that Air Express traffic is entitled to priority space on aircraft ahead of ordinary air freight, whether tendered indirectly by forwarders or directly to the airlines. Consequently, Air Express shipments are handled individually and dispatched on the first available flight, in contrast to shipments handled by air forwarders which are generally held until they can be profitably consolidated with other shipments. (J.A. 603(a); 1376(a) - 1422(a); 1439(a)-1505(a); 1930(a)).

B. Procedural Background of the Present Controversy

Until its order in this case, the Board had uniformly recognized that Air Express, air freight, and air freight forwarders each have their place, serving essentially distinct types of customers and handling different kinds of traffic. Although the CAB recognized that there might be "an element of competition" on the margin which "will inure to the highest development of each," the Board's basic position has been that the three services were essentially complementary and that "public interest requires continuance of [REA's] air express service." See, Air Freight Forwarder Case, 9 C.A.B. 473, 483

(1948); Air Freight Forwarder Investigation, 21 C.A.B. 536 (1955).

The Board's sudden about-face in Order 73-12-36 terminating REA's Air Express authority cannot be considered apart from the history of REA's negotiations with the airlines. Beginning in 1969, following REA's reorganization under new, non-railroad management, it became apparent that REA was paying the airlines a much higher percentage of their costs than the airlines received from forwarders and others for air freight charges. Moreover, it was also evident that the existing Air Express tariff was outmoded and that REA needed permanent operating authority to obtain adequate capitalization and also needed the power to make major tariff changes without the concurrence of the airlines. */

After lengthy discussions with the airlines, negotiations over these issues reached an impasse. With no other course

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*/ The latter position is consistent with that of the CAB as early as 1944. Thus, in the Air Freight Forwarder Case, supra, at 486; the Board explained:

> "If this situation were changed so that the carriers were to make a charge against REA based upon their costs of carrying air express, then the tariff rates to be charged the public could be determined and filed by REA . . . . Under such an arrangement a remedy would be provided for an anomalous situation which permits the air carriers to set tariff rates for REA and at the same time compete with REA for air cargo traffic."

remaining, REA on April 9, 1970 filed a Petition and Complaint with the CAB requesting (1) a permanent Air Express arrangement with the airlines and arbitration of future disputes if negotiations proved unsuccessful; (2) authority for REA to file its own Air Express tariffs independent of the airlines; and (3) CAB oversight to insure that airline charges to REA were fairly related to charges for other types of cargo. Interim financial adjustments relating to divisions were also requested. (J.A. 29(a)-42(a)).

Rather than entertaining REA's Petition and Complaint, the Board dismissed REA's action and artificially bifurcated the single controversy raised by REA into two separate proceedings: (1) the Investigation of Air Express Rates, Docket 22387 (hereinafter the Rates case) in which future Air Express rates and divisions were put at issue; and (2) the Express Service Investigation, Docket 22388 (hereinafter the Service case) in which continuation of Air Express service was to be considered. (J.A. 174(a) - 185(a)).*/

When REA appealed dismissal of its Petition and Complaint to this Court, the Board modified its position so that retroactive divisions in Air Express charges could be considered in the Rates investigation. REA Express, Inc. v. CAB (No. 35474, 2d Cir. 1970). The Board assured the Court that:

> "Of course, any determination made by the Board to grant or withhold such relief in

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*/ At the same time the Board suspended a new Air Express tariff.

the pending investigations will be subject to judicial scrutiny under Section 1006 of the Act (49 U.S.C. 1486)." (J.A. 283(a); emphasis added.)

REA's appeal was then dismissed as moot on March 15, 1971.*/ (J.A. 289(a)).

After nearly two years of proceedings,**/ the Administrative

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*/ After the Board's Service and Rates investigations had begun, various shipper groups sought and obtained a temporary restraining order and a preliminary injunction from the U.S. District Court for the District of Columbia requiring the carriers to continue air express operations because of the real need which shippers had demonstrated for Air Express. The district court's injunction was dissolved only after adoption by REA and the airlines of an "interim" agreement and tariff for Air Express which was to extend until 60 days after the date of final orders in the pending Rates case investigation. (J.D. 597(a)-598(a)). Allied American Bird Co., et al. v. REA Express, Inc., et al., D.D.C. Civil Action No. 2289-70, July 31, 1970 (TRO) and August 12, 1970 (Preliminary Injunction).

**/ Among those who testified before the Administrative Law Judge were (a) the National Industrial Traffic League (NITL) which is a "voluntary organization of shippers, groups and associations of shippers, boards of trade, chambers of commerce, etc., located throughout the United States", (b) the National Small Shipments Traffic Conference (NSSTC) which is an "incorporated organization composed of 230 companies and 19 industrial associations", (c) the Drug and Toilet Traffic Conference (DTTC), which is an unincorporated association of 90 manufacturers of ethical or proprietary drugs speaking for "some 1,000 firms which account for 90 percent of the total sales volumes of medical and toilet preparations in the United States", and (d) the Eastern Industrial Traffic League (EITL), which is a "corporation with 166 members consisting of industrial companies and associations". (J.A. 590(a)-591(a)).

As an example of the testimony offered by shippers, Allied American Bird Company intervened before the Board, pointing out that "it is unable to find a transportation service that can equal their express cost of service" and that the destruction of air express would affect "Allied's ability to continue in business and causing hardship on the many bird breeders who depend on Allied for their market" (J.A. 592(a)). Allied thus urged "continuation of air express as it is presently provided by REA" (Ibid.).

Law Judge rendered his initial decision in the Service case, concluding that the Air Express service provided by REA was essential to the "public interest." The Administrative Law Judge's ultimate findings were: first, that Air Express "is clearly distinguishable from the other [air cargo] services and has a special utility that the operations of the air freight forwarders and direct air carriers presently do not supply" (J. A. 622(a)); second, that "only a single entity can effectively provide an economical air express service" and that therefore "continuation of air express as a partnership arrangement between the air carriers collectively and a ground agency would be in the public interest" (J.A. 626(a)-627(a)); and third, that, as "[t]he record clearly establishes . . . , if air express is to be continued without substantial interruption of service, there are no alternatives beyond utilization of REA as the ground agency for [the] Airlines" (J.A. 627(a)).*/

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*/ Subsidiary factual findings which lead to these conclusions included the following:

-- Air Express serves far more cities and towns than the single carrier door-to-door services of any air freight forwarder (J.A. 606(a));

-- Air Express handles more commodities than air freight forwarders(J.A. 608(a));

-- The value of the priority loading of Air Express has been demonstrated "beyond question" -- and the advantage of priority loading of Air Express can be especially significant during peak traffic conditions (J.A. 619(a));

(cont'd. on p. 19)

On its own motion, the Board decided to review the Administrative Law Judge's decision and his key "public interest" conclusion that REA Air Express "should be maintained basically without change." (J.A. 664(a)). According to the Board, the "real issue" on review was "not whether to continue the separate service known as air express, but whether to attempt to change it -- or to replace it entirely." (J.A. 667(a)). With the choice so framed, the Board disregarded the position taken by REA and decided to abolish Air Express altogether.

Despite its decision to kill Air Express, the CAB purported to recognize the need for "highly expedited service" but barred REA from competing for such service, opting instead for an alternate system of "high priority" service which the airlines might be able to offer sometime in the future and which might provide service comparable to that successfully offered by REA over the years. (J.A. 680(a); 701(a)-702(a)). Even though the alternative service upon which the Board's decison was predicated was hypothetical and speculative, the CAB ordered abolition of Air Express within six months.

(cont'd. from p. 18)

> -- Air Express is the only mode of transportation capable of providing nationwide service for small shipments of secret material for Government contractors, and it is the only service authorized by the Department of Defense to handle such material (621(a));
>
> -- REA is the only qualified ground agency willing and able to enter into agreement with the airlines to provide Air Express service (627(a))."

Almost three months later, on February 27, 1974, after nearly half of the time before termination of Air Express service had elapsed, the Board in a separate docket (No. 26238) authorized discussions among the airlines for the purpose of establishing the replacement service envisioned by the Board's decision. (J.A. 744(a) - 749(a)). On motion of the airlines, a subsequent Order dated April 1, 1974 (J.A. 763(a) - 773(a)) barred all but government observers from these discussions, thus excluding representatives of REA and the shipping public.

With a gap in service clearly inevitable unless the timetable announced by the Board were modified, REA filed a Petition for Reconsideration (J.A. 707(a) - 733(a)) and moved to extend the existence of Air Express until January 31, 1975. (J.A. 752(a) - 754(a)). REA's Motion to extend was supported by twenty-four airlines who concluded an interim agreement with REA providing a mutually acceptable payments schedule through June 1975. (J.A. 755(a) - 757(a)). Despite widespread airline and shipper support for REA's Motion, the CAB on May 6, 1974, denied REA's Petition for Reconsideration and extended Air Express only until July 31, 1974. (J.A. 786(a) - 805(a)).

On the same day, the Board purported to decide the long-pending Rates case and denied REA's motion for consolidation of that case with the Domestic Freight Rate Investigation, Docket 22859. (J.A. 774(a)-785(a)). Yet the requested consolidation was essential, if REA were ever to be permitted to establish its claim, first raised in its original 1970 Petition and Complaint, that the

airlines' share of Air Express revenues must bear a reasonable relationship to air freight charges for other cargo.*/

By its Rates decision, the Board postponed any action on the economic and rates issues underlying Air Express. Thus, the Board characterized the issue of future divisions as "moot," agreed that the record in the Rates case was outdated, but instead of consolidating, directed that the parties meet in an "informal conference with a view to reaching agreement" on a settlement formula providing "appropriate divisions" between REA and the airlines for the entire "period April 1970 forward" (Rates O. at 1, 9).

The Board's Order in the Rates case underscored once again the close interdependence of the service and rate issues. Thus,

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*/ Thus, REA pointed out in its motion to consolidate (J.A. 737(a) - 743(a)) that the record in the Rates case was stale (1) because the Administrative Law Judge denied several REA motions to reopen the record to include important newly-discovered evidence, a contention REA had made in its prior Brief to the Board in the Rates case; (2) because the evidence presented was based on the year 1970, with no allowance for inflation; (3) because the allocations of costs were based on outdated volumes of traffic; and (4) most importantly, because the Board's own Bureau of Economics had changed its method of allocating costs in its exhibits recently filed in the Freight Rate case. (Docket 22859).

The significance of the latter point is critical for if the costing method used by the Bureau in the Freight Rate case had been used in the Rates case, the airlines would have recorded profits of $5 million on Air Express, instead of the losses shown by the Bureau in its exhibits in the Rates case. (Docket 22859, Exhibit REA-R-1, (J.A. 1759(a) - 1780(a)).

in the Service case, the Board stressed that "REA's financial position has deteriorated drastically" in recent years, and predicted an upturn only "by a substantial increase in air express traffic volume" (J.A. 688(a); 674(a)). Yet a timely Board decision accepting REA's position in the Rates case would have resulted in an infusion of millions of dollars to shore up REA's Air Express operations.

With resolution of the bedrock economic issues, raised more than four years earlier by REA, indefinitely postponed by the CAB's Rates decision, REA filed its Petition for Review in this Court on May 7, 1974. (J.A. 806(a) - 812(a)). Shortly thereafter, REA formally moved before the CAB for a stay of the Board's Orders in the Service and Rates cases pending judicial review. (J.A. 832(a) - 864(a)). As with its previous Motion for Extension, REA was supported in its Motion for Stay by hundreds of shippers and twenty-four airlines who feared a serious gap in service if Air Express were permitted to expire.

On June 26, 1974, the Board denied REA's motion. Thereafter, on July 5, 1974, REA, with the active and overwhelming support of the shipping public, petitioned the Court for a stay of the Board's Orders. On July 16, 1974, over the strenuous opposition of the CAB, a stay was granted because of the substantial issues raised by REA's Petition for Review and the need to permit continuation, pending judicial review, of REA's unique, longstanding service to thousands of shippers.

ARGUMENT

I. RATHER THAN LIMITING ITS CONSIDERATION TO SELECTED ADVERSARY CONTENTIONS, THE BOARD WAS OBLIGATED TO BASE ITS DECISION ON THE RELEVANT "PUBLIC INTEREST" CONSIDERATIONS EXPRESSLY SPECIFIED BY CONGRESS IN THE FEDERAL AVIATION ACT.

The CAB is a creature of statute and charged by Congress with carefully defined regulatory duties, powers and responsibilities under the Federal Aviation Act. Nowhere has Congress granted the CAB absolute discretion with respect to matters falling within its jurisdiction. Rather, the Board is "bound to exercise its discretion within the limits of the standards expressed by the Act", and to confine its considerations to the specific Congressional priorities established for evaluating the "public interest" in air transportation. FPC v. Texaco, Inc., ___ U.S.___, 42 U.S.L.W. 4867, 4872 (June 10, 1974). Transcontinental Bus System Inc., v. CAB, 383 F.2d 188, (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968).

Under the provisions of both the Federal Aviation Act, 49 U.S.C. §1486, and the Administrative Procedure Act, 5 U.S.C. §§701-706, it is incumbent upon this Court to "hold unlawful and set aside" all actions, findings, and conclusions which are "not in accordance with law" 5 U.S.C. §706. Plainly, where, as here, the Board abandons the statutory scheme for an entirely ad hoc approach based on its own -- not Congress' -- views of sound transportation

policy, the only proper course is to set aside the Board's action and remand with specific directives that the CAB follow the Aviation Act. ALPA v. CAB, 475 F.2d 900, 905-06 (D.C. Cir. 1973).

The statutory considerations which Congress intended for the Board to apply in this case could not be more clear. REA's authority to operate Air Express derives from Section 101(3) of the Federal Aviation Act, 49 U.S.C. §1301(3), which provides that the Board "may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest" (emphasis added). The Air Express agreements are also subject to Section 412 of the Act, 49 U.S.C. §1382(b), which requires Board approval if such agreements are not "adverse to the public interest."

By these provisions, the Board's Air Express investigation must focus on the question of whether the Air Express service long provided by REA has become "adverse to the public interest." The Act is explicit as to the "things" which "the Board shall consider" in making this determination. 49 U.S.C. §1302. First of all, under Section 102(a), the "public interest" requires that the Board's decision promote "the encouragement and development of an air-transportation

system properly adapted to the present and future needs of foreign and domestic commerce . . ." 49 U.S.C. §1302(a) (emphasis added). Thus, shipper concerns and interests in Air Express are critical.

The "things" which the "public interest" requires the CAB to consider in the "development" of such an "air-transportation system" are equally specific. The Board is directed to regulate air transportation in such a manner as to "foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers" 49 U.S.C. §1302(b)(emphasis added). By this directive, the Board must examine "economic conditions," including present and projected rates, and promote "transportation systems" which "coordinate transportation" by air carriers. Consequently, REA's interline coordinating role and ability to unify documentation and cut administrative costs are of major importance.

The CAB's required examination of the "economic conditions" affecting Air Express is not restricted simply to rates which are or could in the future be charged by REA. Rather, the Board is directed to look also at rates charged by competing forms of air cargo service since the Board in assessing the "public interest" must promote "adequate,

economical, and efficient service by air carriers at reasonable charges," and competition among different types of air cargo service "to the extent necessary to assure the sound development of an air-transportation system" 49 U.S.C. §1302(c) & (d). Because of these directives, the comparative economics of Air Express, air freight, and air freight forwarding are critical to any assessment of the "public interest."

Indeed, since any decision relating to continuation of Air Express necessarily would affect, or possibly even abolish, the rates published in current Air Express tariffs, the CAB must make the same searching inquiry as is required for any decision or action "with respect to the determination of rates" 49 U.S.C. §1482(e); Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970). In particular, the Board must assess "the effect" of any change or abolition of existing rates "upon the movement of traffic," and take into account "the need in the public interest of adequate and efficient transportation of . . . property by air carriers at the lowest cost consistent with the furnishing of such service" 49 U.S.C. §1482(e)(1) & (2)(emphasis added). */

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*/ As the Supreme Court stated with respect to ICC action in Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 817(1973):

> "Even giving the Commission's opinion the most sympathetic reading we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their service without showing that the rates they propose to maintain are reasonable rates for the service they intend

In short, the CAB has no roving mandate to limit the air express investigation to selected contentions of the parties while ignoring the relevant statutory standards. Indeed, the "public interest" criteria established by Congress in 49 U.S.C. §§1302 and 1482 are the Board's only legitimate guideposts. And only after thorough consideration of the needs of the shipping public, the types of cargo offered, and the special characteristics of each, as well as the economic, ratemaking factors applicable to such services, can the Board decide whether continuation of air express service is in the "public interest."

Absent a legitimate "public interest" determination on the need for air express service, the statute provides no occasion for consideration of qualifications, economic or otherwise, of any applicant, including REA, to provide such service. Indeed, the command in §1302(b), that the Board "foster sound economic conditions in such [air] transportation" clearly obligates the Board to revive rather than execute a financially troubled carrier. Northeast Airlines v. CAB, 331 F.2d 579 (1st Cir. 1964).

In fact, for its decision to pass muster on judicial review, the Board must do more than merely consider the relevant factors specified by Congress. For unless the Board "has given reasoned consideration to all the material facts and issues" and articulated "with reasonable clarity

its reasons for decision" no meaningful judicial review is possible. Greater Boston Television Corp. v. FCC, 444 F. 2d 841, 851 (D.C. Cir. 1970), cert. denied, 406 U.S. 950 (1971); see SEC v. Chenery Corp., 318 U.S. 80 (1943). As this Court has stressed in reviewing CAB actions, "[we] must know what a decision means before the duty becomes ours to say whether it is right or wrong" ABC Air Freight Co., Inc. v. CAB, 391 F.2d 295, 300 (1968).

Accordingly, this and other courts have not hesitated to reverse CAB actions where the Board has failed to state findings, conclusions and the reasons regarding "all material issues of fact, law and discretion presented on the record" 5 U.S.C. §557(c). ABC Air Freight Co., Inc. v. CAB, supra, at 302 (2d Cir. 1968); Trailways of New England, Inc. v. CAB, 412 F.2d 926, 936 (1st Cir. 1969); Braniff Airways, Inc. v. CAB, 379 F.2d 453, 462 (D.C. Cir. 1967); Northeast Airlines, Inc. v. CAB, 331 F.2d 579, 588 (1st Cir. 1964); Carey v. CAB, 275 F.2d 518, 524 (1st Cir. 1953); Trans-continental Bus System, Inc. v. CAB, 383 F.2d 188 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968).

Plainly, the crucial importance of this requirement is all the more significant where, as here, the Board has abruptly reversed its own long-standing finding that Air Express is essential to the "present and future needs" of

the public and "sound development of an air-transportation system" 49 U.S.C. §1302(a) & (d). For, in such cases, the CAB's opinion must reflect "the careful investigation, the substantial evidence and the rational explication that are demanded before an expert agency may lawfully embark on a new course . . . ." ABC Air Freight Co., Inc. v. CAB, supra, at 307; Northeast Airlines v. CAB, supra at 589 (Aldrich, J. concurring).

If anything, an even higher standard would apply here since the CAB not only abandoned its own long-standing conclusion that Air Express is in the public interest but also rejected the findings of its Administrative Law Judge who had "lived with the case."*/ As the Third Circuit put it in In re United Corp., 249 F.2d 168, 181 (1957):

> "[W]here the agency fails to adopt the findings of the hearing examiner, the [Administrative Procedure Act, 5 U.S.C. §557(c)] requires the Agency to make a finding or ruling on each exception taken to the intermediate report . . . . A bare conclusion is insufficient even when prefaced by a statement that it was reached after careful consideration of all the evidence."

Besides the overriding requirements that the Board anchor its action on the considerations specified by Congress,

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*/ See NLRB v. Majestic Weaving Co., 355 F.2d 854, 859 (2d Cir. 1966); Braniff Airways, Inc. v. CAB, 379 F.2d 453, 467 (D.C. Cir. 1967); In re United Corp., 249 F.2d 168, 178 (3d Cir. 1957); Greater Boston Television Co. v. FCC, 444 F.2d 841, 853 (D.C. Cir. 1970), cert. denied, 406 U.S. 950 (1971).

and that its opinion fully and carefully articulate and explicate the bases for its decision, it is also necessary that the Board's finding on each of the statutory considerations be "supported by substantial evidence . . . on the record . . ." 5 U.S.C. §706(2)(E); see Consolidated Edison Co. of New York v. N.L.R.B., 305 U.S. 197, 229 (1938); Greater Boston Television Corp. v. FCC, supra.

* * *

In this case, the Board's decision to exterminate Air Express is neither grounded in the considerations set by statute nor supported by substantial evidence and, therefore, must be reversed and remanded for new proceedings subject to specific directions from this Court.

To begin with, the CAB's opinions never once mention the detailed and specific statutory scheme which Congress intended to control the Board's action. From this remarkable omission, one would think that the CAB possesses unrestrained authority to abolish Air Express for any reason it chooses. This assumption of untrammeled authority alone requires reversal of the Board's decision. ALPA v. CAB, supra.

Instead of framing the issues in terms of the statutory "public interest" criteria, and deciding whether the Administrative Law Judge, airlines, and shippers were correct that "express service in its present form serves a useful public

purpose" (J.A. 664(a)), the Board immediately assumed that "[t]he real issue . . . is not whether to continue the separate service known as air express, but whether to attempt to change it -- or to replace it entirely" (J.A. 667(a)). As a result, the Board essentially concluded that obstacles to REA's specific reform proposals necessitated an end to Air Express, without ever exploring alternative means of strengthening this essential service.

The CAB must by statute look out for the interests of all concerned parties, including especially the shipping public, and frame its proceedings solely in terms of the statutory "public interest" considerations. Northeast Airlines v. CAB, supra. By adopting an adversary approach rather than the "public interest" approach prescribed by statute, the CAB's action was preordained once it decided to reject REA's adversary position. With the decision to execute Air Express already made, the remainder of the Board's opinion vainly, and improperly, attempts to ameliorate the blow to shipper interests by distorting the geographic and commodity coverage of vastly more expensive forwarder services, and ultimately, by fabricating out of whole cloth a hypothetical priority service offering by direct air carriers. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 419 (1971)(agency action cannot be justified by post hoc rationale).

As we shall show in the remainder of our brief, there are three key defects in the Board's adversary oriented, "winner-take-all" approach:

First, the Board never reached, much less fully considered, the statutory economic and rate issues which were vital to the future of Air Express, and crucial to its unique utility to shippers and the development of air transport.

Second, rather than conduct the "public interest" inquiry prescribed by statute, the Board substituted irrelevant and extraneous reliance on REA's supposed precarious financial condition as an excuse for administering euthanasia to Air Express, failed even to decide rates issues determinative of REA's financial position, and totally abdicated its statutory responsibility to "foster sound economic conditions in [air] transportation" by exposing REA to almost certain collapse.

Third, in attempting to justify its total disregard of shipper interest and testimony, the Board modified, on the basis of sheer speculation, the Administrative Law Judge's findings on REA's vastly superior geographic and commodity coverage and papered over the critical gap in priority service with a hypothetical

airline priority service, which still does not exist, and which is supposedly to result from an ex parte discussion procedure excluding REA and the shippers.

II. BY SHUNTING KEY RATES ISSUES OFF INTO A SEPARATE PROCEEDING WHICH IT NEVER DECIDED, THE CAB IGNORED ITS STATUTORY MANDATE TO ACT IN THE "PUBLIC INTEREST" AND SIDESTEPPED ANY CONSIDERATION OF THE COMPARATIVE COSTS OF AIR EXPRESS SERVICE, THE VALUE OF AIR EXPRESS TO THE NEEDS OF COMMERCE, AND THE ROLE OF AIR EXPRESS IN DEVELOPING AIR TRANSPORTATION.

REA's Petition and Complaint which prompted institution of both the Board's service and rate investigations presented the CAB with an opportunity and an obligation to conduct a comprehensive examination of the economics of air express as a unique transportation concept, and to explore the various options for reforming air express service. In this way, the Board could properly have addressed the statutory issues of whether air express provided "efficient transportation of . . . property by air carriers at the lowest cost consistent with the furnishing of such service," and "efficient service by carriers at reasonable charges" 49 U.S.C. §§1482(e)(2), 1302(b). Moreover, based on a comprehensive analysis of air express costs and tariffs, both absolutely and relative to other air cargo services, the Board could have proceeded to assess the impact of air express on "the present and future needs of the . . . domestic commerce of the United States," and "the development of civil aeronautics" 49 U.S.C. §1302(a)(f).

The Board chose, however, not to go forward with an integrated investigation but immediately to bifurcate the air express proceedings into a Rates case and a Service case. This critical misjudgment totally disrupted the orderly presentation of the relevant issues,*/ and ultimately resulted in the Board's paradoxical holding the future economic issues were "moot" because the Board had already decided to end air express service without reaching or considering economic factors. For the reasons set forth below, the Board's failure ever to come to grips with the pivotal economic and rate issues lying at the heart of air express service renders the Board's decision fatally defective. Schaffer Transportation Co. v. U.S., 355 U.S. 83 (1957).

A. The Board's Failure to Fix the Relative Rate Levels of Air Express and Competing Services Prevented the Board from Even Considering "Efficient Transportation of . . . Property . . . at the Lowest Cost" and "Efficient Services by Carriers at Reasonable Charges" as Required by the Federal Aviation Act.

The Administrative Law Judge in the Service case quite properly reviewed the preliminary economic data assembled in the Rates case, and, placing important reliance on such data,

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*/ For example, during the oral argument in the Service case, parties argued that it was "legally" impermissible for the CAB even to consider economic factors since these were "involved in a separate proceeding: and "totally unresolved at the present time." (J.A. 2050(a); 2051(a); 2054(a)).

expressly found that air express service as provided by REA and the airlines results in "substantial economies that can be passed on to the shipping public in the form of lower rates" (J.A. 621(a)). Comparing other forms of coverage, the Administrative Law Judge crucially determined that "air freight forwarder service is not endowed with the favorable economics of a single ground agency concept, and consequently it cannot develop a rate structure for small shipments commensurate with air express" (J.A. 624(a) emphasis added). On the contrary, the available economic data conclusively showed that shifting the approximately 4 million annual minimum-charge shipments now carried by REA into forwarder channels would increase the cost of carriage from $9.68 to $16.23, and would raise by approximately 56 percent the average cost of shipments now moving by air express. (Id.) */

Since the Board opted to "moot" rather than decide the Rates case, it was in no position to contradict these findings but instead purported to adopt the conclusions of the Administrative Law Judge not expressly modified by its opinion. (J.A. 671(a)n.4). Paradoxically, however, without even mentioning the Administrative Law Judge's exhaustive findings based on comparative economics, the Board summarily concluded that "air express will fill no unique service needs" (J.A. 676(a), and that the low level of air express rates "does not

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*/ This computation is derived from exhibits presented by the airlines in the Service case. (J.A. 1535(a)-1537(a).

outweigh" other considerations. (J.A. 672(a)-673(a). Despite their obvious relevance, the Board not only ignored comparative economic factors and data but actually imposed a procedural bar to their consideration by declining to consolidate the Rates case with its general investigation of air cargo (and consequently air freight forwarder) rates. (J.A. 783(a) - 785(a); Docket Nos. 22387 and 22859).

The Board's strained effort to decide the future of air express service without resort to comparative economics is plainly contrary to the Federal Aviation Act and established precedent under other transportation statutes. For example, in Schaffer Transportation Co. v. U.S., supra, the Supreme Court stressed that relative or comparative economic analysis of competing transportation services was absolutely essential to any "public interest" determination. 355 U.S. at 92.

In Schaffer, the Interstate Commerce Commission had rejected a trucker's application to offer service paralleling that of a railroad. Like the CAB here, the ICC had failed to consider whether the new service might provide lower rates for small shipments than the existing rail service. Holding that "a rate benefit attributable to differences between the two modes of transportation is an 'inherent

advantage' of the competing type of carrier [which] cannot be ignored by the Commission," the Supreme Court set aside the ICC's decision and remanded the proceedings with instructions to weigh and consider the relative economic advantages and rates for different types of shipments offered by both rail and motor carriage over the routes at issue. Id. at 92-93.

As with the ICC Act in Schaffer, the Federal Aviation Act is explicit that comparative economic factors such as the need of shippers for "efficient transportation of . . . property . . . at the lowest cost" and "efficient services by carriers at reasonable charges" must be considered as part of the Board's "public interest" determination. Since the Board eschewed any real consideration of these economic factors here, it is incumbent upon this Court to reverse and instruct the Board to complete its air express Rates investigation, and to establish the relative and comparative structure of air express and air cargo rates, before making any final determination to reduce air express service.*/

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*/ Moreover, in light of the Board's failure to consider or discuss these matters in its opinion, any new decision regarding the future of air express must reflect "not only deep and mature thought, but . . . the assembly of the most cogent reasons," and must be supported by "thorough analysis and explications" Northeast Airlines, Inc. v. CAB, 331 F.2d 579, 589 (1st Cir.,1964)(Aldrich, J. concurring).

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services were inadequate for their needs. Indeed, the shippers' collective conclusion was, and is still, that Air Express is essential to their transportation needs and that no other comparable or acceptable service is now available or likely to emerge in the foreseeable future. */

Despite this compelling and unequivocal shipper sentiment, the CAB, in its Service order, barely mentioned the exhaustive shipper evidence in the record. Instead, the Board glibly observed that as a result of its Order "the methodology for expedited shipping of small packages must undergo a profound -- and not entirely predictable -- transformation" (J.A. 696(a)), and conceded that "uncertainties are inevitable in the days ahead for air cargo service to small communities" (J. A. 671(a)).

These understated admissions by the CAB as to the effect of its decision are small comfort to shippers, many of them small businesses vitally dependent upon Air Express, which require small parcel transportation or are located in smaller communities. For the CAB has destroyed the one

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*/ (J.A. 912(a) - 1199(a); 1360(a) - 1375(a); 1357(a); 1359(a); 1610(a) - 1644(a); 1846(a); 1848(a) - 1849(a); 1854(a); 1857(a) - 1869(a); 1871(a) - 1875(a); 1891(a) - 1921(a); 1923(a); 1927(a); 1933(a) - 1938(a); 1941(a); 1944(a) - 1946(a); 1949(a); 1959(a)).

service adapted through years of experience to the needs of these shippers without guaranteeing the availability of a replacement service now or ever.

Even when the Board purported to examine means for replacing the unique geographical, commodity and priority aspects of air express service, it did so on a wholly hypothetical basis without any consideration of the rates to be charged by the theoretical alternative service. Thus, the Board made no finding regarding tariff levels to be applied by air freight forwarders, even if forwarders were somehow to expand into the literally hundreds of airport cities which they do not presently serve. (J.A. 625(a)).

Equally significant, the CAB disregarded the virtual certainty that carriage of live animals and other unique commodities would be vastly more expensive if handled by forwarders, thereby underscoring the very real shipper concern that an end of REA's tariff levels would gravely damage or even terminate their businesses. (J.A. 1916(a) - 1917(a)).

Finally, while laying great stress upon surveys indicating that one freight forwarder (Emery) might be able to move some types of small packages as quickly as REA, the Board conveniently neglected to mention the more than 50 percent premium imposed on shippers by forwarders for this service. (J.A. 678(a); 1606(a) - 1609(a)). And in calling for a substitute priority service by direct air carriers, the Board totally ignored the Administrative Law Judge's finding that the "high priority service" proposals of record "do not have the capacity to produce as reasonable a rate structure for air express" (J.A. 629(a)).

In these circumstances, it is not surprising that the Board initially acknowledged that REA's Air Express rates were "a compelling reason to continue air express" (J.A. 670(a)). What is astounding, however, is the Board's inexplicable decision to abolish Air Express, together with its highly favorable rate structure, without ever assessing the economic impact of theoretical alternatives on shippers -- a statutory

inquiry which could not be more plain from the Aviation Act's requirement that the Board determine the "present and future needs of foreign and domestic commerce" 49 U.S.C. §1302(a). See Flying Tiger Line v. CAB, 350 F.2d 462, 465 (D.C. Cir. 1965)(CAB economic powers are for protection of shippers).

In short, the Board's approach to the Service investigation is virtually indistinguishable from the ICC decision rejected by the Supreme Court in Schaffer Transportation, supra. In Schaffer, shippers testified that they favored the proposed truck service because it would avoid the need for consolidation of small shipments into a full rail car and thus enable them "to maintain lower inventories, receive their freight faster and more frequently, and, thus, be able better to meet erection deadlines, especially during the peak season" 355 U.S. at 82-83. Shippers also advocated the lower truck rates. Id. at 91.

The ICC, as the Board here, rejected these considerations because the existing rail service was "reasonably adequate" Id. at 89. The Supreme Court flatly disapproved the ICC's approach and ordered the Commission to undertake a thorough evaluation of the service and rate considerations urged by the shippers. Id. at 90-91. Similarly, this Court must reject the CAB's disregard of shipper interests and instruct

the Board to evaluate carefully the impact of changes in Air Express on shipper interests after a comprehensive analysis of the absolute and comparative rate characteristics of the Air Express service. See ALPA v. CAB, supra.

C. The Board's Failure to Evaluate the Economics of Air Express Service Prevented Effective Consideration of the Impact of Air Express on "the Promotion, Encouragement and Development of Civil Aeronautics"

The Administrative Law Judge's comprehensive factual inquiry disclosed that the economic advantages of air express service were of vital importance to the development of a balanced "air transportation system."

To begin with, the Administrative Law Judge stressed that, in the absence of air express tariffs, smaller, regional carriers "would suffer nearly total diversion [to surface modes] of the traffic theretofore carried as air express" (J.A. 626(a)). Furthermore, an expansion of air freight forwarder activities could hardly prevent this "diversion" since many air freight forwarders had obtained or were obtaining surface freight forwarder authority from the ICC to enable connection of remote locations to consolidating centers by surface transportation. (Id.) Thus, the possible abolition of Air Express raised the spectre of a significant backward step for the development of airline cargo service outside dense traffic routes.

In addition, the Administrative Law Judge emphasized that trunkline carriers suffer from problems of unused cargo space in their daytime service or combination (i.e., passenger/cargo) operations. Air freight forwarders move only 42 percent of their shipments on combination aircraft, while Air Express moves 80 percent of its traffic on daytime combination flights. (J.A. 626(a)). Consequently, as found by the Administrative Law Judge, a shift of traffic from Air Express to forwarder operations would be likely to exacerbate the imbalance already existing in the air transport system. (Ibid.)

Despite the Board's purported acceptance of the Administrative Law Judge's findings, the Board's decision in the Service case never even hinted at, much less evaluated, the impact which termination of Air Express would have on the air transportation system. And, indeed, in the absence of any meaningful findings regarding projected or potential rate structures for any promised replacement service, it was impossible for the Board to gauge the effect of its action on the "sound development of an air-transportation system" 49 U.S.C. §1302(d).

Yet, the applicable judicial precedents are unanimous that such an assessment must be made. For instance, in REA v. CAB, 342 F.2d 422 (D.C. Cir. 1957), the Court, at

the Board's urging, held that the Board properly emphasized, in considering air cargo tariffs, the need to utilize cargo space in combination aircraft. And, in Trailways of New England, Inc. v. CAB, 412 F.2d 926, 934 (1st Cir. 1969), the Court expressly held that intermodal competition "is a legitimate matter for consideration."

In sum, under these decisions, and the undisputed findings of the Administrative Law Judge, the Board plainly erred in neglecting to analyze the effect of Air Express on the "development of civil aeronautics" as required by 49 U.S.C. §1302(f). At a minimum, the Board's failure to address this issue necessitates reversal and remand for the Board to explain what evaluation, if any, the Board made of this issue, taking into account the record evidence regarding the economic characteristics of air express rates and service. ABC Air Freight Co., Inc. v. CAB, 391 F.2d 295, 300 (2d Cir. 1968).*/

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*/ Moreover, given the emphasis placed by forwarders on all cargo night operations, and airline competition for forwarder business, a proper analysis of the impact of the Board's decision would have uncovered potential changes in day/night operational patterns clearly requiring an Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. §4321.

III. THE CAB'S USE OF REA'S FINANCIAL DIFFICULTIES TO SUPPORT EUTHANASIA, RATHER THAN SUSTENANCE, FOR REA INVALIDATED THE SERVICE INVESTIGATION AND STOOD ON ITS HEAD THE BOARD'S STATUTORY DUTY TO "FOSTER SOUND ECONOMIC CONDITIONS" IN AIR TRANSPORTATION

As the agency responsible for fostering "sound economic conditions" in air transportation, the CAB has maintained a long-standing policy of exercising its authority to assist in the rehabilitation of financially weakened carriers. See Northeast Airlines v. CAB, 331 F.2d 579, 583, 588 (1st Cir. 1964). In evaluating the financial position of REA, however, the Board reversed this traditional policy and attempted to use REA's financially weakened condition as a bootstrap rationale for terminating air express service.

The Board's impermissible intermixture of REA's financial problems (which are generally unrelated to Air Express) with the economies of air express service fatally infected its decision in the Service investigation. Moreover, the Board's financial premise was itself at issue in the Rates case, which could have provided substantial financial relief to REA but remained undecided by the Board. Finally, the Board erroneously misconstrued its own legal mandate to strengthen REA's air express service, and thus condemned REA to a terminal experiment in air freight forwarding.

A. The Board Improperly Bootstrapped REA's Weakened Financial Condition into a Justification for Euthanasia

In searching for a rationale for reversing its own previous, carefully considered determinations that air express service is in the public interest (see Air Freight Forwarder Case, supra (1948); Airfreight Forwarder Investigation, supra (1955)), the Board hit upon REA's financial problems as a means of devaluing the inherent value of the air express service. Thus, the Board claimed that "REA's historic broad geographic coverage is clearly a relic of the past. Not only is REA already consolidating its service, but it must soon retrench if it is to survive" (J.A. 682(a) - 683(a)). Likewise, the Board contended that, "[f]or the same reasons, REA will reduce the number of commodities for which it offers service" (J.A. 683(a)n.27).

The Board, however, did not, and could not, tie REA's financial difficulties to the inherent characteristics of air express, nor did the Board dispute the Administrative Law Judge's finding that REA was fit, willing and able to perform air express service.

In reality, REA's recent financial woes were largely caused by losses from REA's surface transportation, where shipments have dropped from 53 million in 1966 to 15 million in 1971. (J.A. 631(a)). These surface traffic

losses have little to do with Air Express, but are instead directly attributable to increases in the size and weight of packages accepted as parcel post by the U.S. Postal Service. (Ibid.) Congress, alert to the threat posed by parcel post, has forthrightly declared its policy that REA be protected:

> "The maintenance of an efficient nationwide express service is as important an objective of national transportation policy as the maintenance of an efficient nationwide parcel post system. If, as a matter of policy . . . the Government diverts a large part of REA's present traffic, REA must be permitted to develop the services and techniques which are necessary to penetrate new markets and develop new traffic. . . . The committee hopes that the appropriate regulatory bodies will take cognizance of the vital importance of maintaining an efficient private express system." */

Consequently, the CAB's reliance on REA's weakened financial condition flouts not only the legitimate, statutory "public interest" considerations contained in the Federal Aviation Act, but also the more recent, explicit Congressional directive to moderate rather than exacerbate the strains imposed on REA's surface business by an expanded parcel post service.

In the Northeast Airlines case, supra, the Board was reversed in a remarkably similar attempt to eliminate a vital competitive service as a means of doing away with a financially weak carrier. There, the CAB had determined in 1956 that a third carrier was necessary to provide

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*/ S.Rep. 1534, 89th Cong., 2d Sess., 6-7 (1966) (emphasis added).

additional service between the northeastern coastal area and Florida. Northeast was selected and awarded a five-year certificate, inter alia, because its route structure needed strengthening.

In 1961, the Board refused to grant Northeast's application for renewal of its certificate. The Board's decision, like its action here, was grounded largely on consideration of Northeast's finances -- not on the need for a third carrier on the Florida route. The Court of Appeals reversed, stating that where the reasons given by the CAB for its decision were "either irrelevant or inadequately developed" the "case must go back to the Board" (Id. at 588).

Here, as in Northeast Airlines, the Board's treatment of the separate issues of air express service and REA finances is so confusingly interwoven that the Court "cannot be sure of the basis on which [the Board] rested [its] conclusion" Id. at 588. For this reason alone, the Board's order must be set aside and remanded for independent consideration of the "public interest" in air express service. Once the Board in new proceedings finds in favor of continuation of Air Express, it must, pursuant to its statutory responsibility to "foster sound economic conditions," undertake the reforms necessary to sustain REA's unbroken, successful performance of air express service. 49 U.S.C. §1302(b).

B. The Board Improperly Evaded a Decision on the Divisions Issue in the Rates Case Which Might Itself Have Resolved REA's "Financial Plight"

In its original Petition and Complaint, REA asked the Board to determine the lawfulness, prospectively as well as retroactively, of the rates divisions between REA and the airlines. The Board initially ducked this issue and limited its Rates case to future divisions issues. Only after REA appealed to this Court did the Board relent and broaden the Rates case to include this critical retroactive divisions issue.

The evidence presented by REA to the Administrative Law Judge in the Rates case indicated that, up to the date of the Board's decision in the Service case, REA had been undercompensated by as much as $50 million by its airline partners. (J.A. 1755(a) - 1758(a)). Even the method used by the Board's own Bureau of Economics in the Freight Rate case would have resulted in a retroactive payment of $25 million (J.A. 737(a) - 743(a); 1759(a) - 1780(a)). There can be little doubt that a recovery of this magnitude would have restored REA's financial health.

Nevertheless, the Board refused to decide the retroactive divisions issue and simply ordered its Bureau of Economics to convene an informal conference to discuss this and other rates issues (J.A. 774(a) - 782(a)). This cavalier disposition of a matter so vital to REA not only transgressed

the statutory limitations on ex parte resolution of rates issues but also undercut entirely any basis whatsoever for the Board's conclusions regarding REA's financial circumstances. See Moss v. CAB, 430 F.2d 891 (D.C. Cir. 1970) (Board cannot delegate ratemaking functions to ex parte meetings); cf. SEC v. Chenery Corp., supra. Moreover, failure to consolidate the Rates case with the Freight Rate case for updated hearings deprived REA of the benefit of much newly discovered evidence, including the change in position by the CAB's own Bureau of Economics.

C. By Misconstruing Its Statutory Authority, the Board Needlessly Exposed REA to Financial Collapse and Cynically Dispatched REA to an Impossible Future in Air Freight Forwarding

The Board's decision to terminate REA's Air Express depended heavily, as explained above, on the Board's conclusion that air express could not be successfully reformed along the lines urged by REA in its 1970 Petition and Complaint. (J.A. 689(a) - 695(a)). This conclusion, in turn, rested on the unjustified assumptions that the necessary reforms requested by REA were substantial, that such reforms were opposed by the airlines and that the Board lacked authority to effect them.

In fact, the REA/airline partnership is far more harmonious than the Board's opinion would suggest. For REA and the airlines have never disagreed on the need for air express

service or that such service is vital to the "public interest." As REA advised the Board, negotiations after the date of the Board's initial Service order resulted in progress on a number of difficult issues. (J.A. 860(a) - 864(a)). Also the Board was aware that 24 airlines supported REA's Petition for Reconsideration of the Service order. Most important, the Board could not ignore the fact that Air Express continued to function even after the devastating signal transmitted by the Board in the Service case.

In addition to its mistaken view of REA airline relations, the Board's legal authority to reform air express is actually far broader than suggested in the Service decision. Thus, while the Board acknowledged that it "could license REA to operate independently of an airline-REA agreement, and could compel the airlines to publish an air express tariff covering rates to REA," it claimed that such an arrangement could not work because the airlines might refuse to provide ground services at airports where REA has no field offices. (J.A. 799(a); 687(a)). But the CAB has broad powers to attach "such reasonable terms, conditions and limitations as the public may require" to direct air carrier certificates. 49 U.S.C. §1371(c)(1). Moreover, the CAB can enforce upon the airlines their statutory duty to provide "adequate service, equipment and facilities in connection with [air] transportation" under 49 U.S.C. §1371(e)(1).

In short, the CAB's rejection of REA's reform proposals was grounded on a wholly inaccurate evaluation of the facts and a misconstruction of the Board's own legal authority to implement the changes suggested by REA. The only appropriate course is for the Board's decision to be reversed for reconsideration on a more realistic basis.

Even more signficant, the Board's relegation of REA to an immediate shift into air freight forwarding without any transition period contravenes the Board's own frank admission that "[t]he collapse of REA is not in the public interest" (CAB Opposition to Stay, July 11, 1974, p. 39). For, as this Court was told in granting a stay, REA cannot survive financially under this draconian directive.

REA's existing air express operations provide neither the facilities nor the equipment for air freight forwarding. Because the air cargo tariffs under which air freight forwarders operate have significantly lower per unit charges for larger, unitized shipments, it is essential that freight forwarders consolidate and containerize or palletize their cargo. This, in turn, requires specialized handling equipment. REA's present air express operations, where consolidation is not permitted, are conveyor belt oriented and can provide few of the facilities required for efficient freight forwarding.

Thus, before any significant changeover, REA would be required to acquire larger facilities and also heavy equipment to lift and move volumes of freight much greater than Air Express currently carries. Moreover, even REA's labor requirements would change since its employees would be required to learn overnight new and significantly different operating procedures as well as new airline freight tariff provisions and freight consolidation requirements which are not applicable to REA's existing Air Express service. The capital to finance the needed plant and equipment changes and to see REA through this start-up period is simply unavailable.

In sum, the CAB's disposition of REA's corporate future, a decision vitally affecting REA's surface customers, creditors and 15,000 employees, was flatly contrary to both the Board's statutory responsibility to "foster sound economic conditions in air transportation" and the overall requirement imposed by the courts that the most serious consideration be given to potentially debilitating decisions. 49 U.S.C. §1302(b); Carey v. CAB, 275 F.2d 518, 524 (1st Cir. 1960). Accordingly, this Court should, on remand, instruct the Board that any future decision affecting air express must provide a viable future for REA.

IV. NEITHER THE CAB'S POST HOC SPECULATION DESIGNED TO SOFTEN THE ADVERSE IMPACT OF AIR EXPRESS TERMINATION ON GEOGRAPHIC AND COMMODITY COVERAGE FOR SHIPPERS, NOR ITS "WHOLE CLOTH" FABRICATION OF A HYPOTHETICAL REPLACEMENT PRIORITY SERVICE, MEASURES UP TO THE BASIC CANONS OF "SUBSTANTIAL EVIDENCE" AND "DUE PROCESS"

With the extinction of Air Express effectively pre-ordained by the Board's overall approach, the Board's opinion contains little more than a terse apologia for the loss of essential air express service to many shippers. Thus, recognizing, as it must, that the end of Air Express would inevitably cause severe service gaps for many commodities and in many parts of the country, the Board sought to depict the adverse effects upon the shipping public as short-lived and inconsequential. It did so, however, only by grossly distorting the record evidence and by engaging in sheer speculation and conjecture. For in one breath, the CAB concedes the need for the expedited priority service which Air Express has always provided, while in the next instant it wildly postulates that this manifest need can best be met through a hypothetical "high priority" tariff to be offered by the airlines. The precise nature of this new service was, however, never clearly defined, and accordingly, Air Express was eliminated without any opportunity for a rational, non-arbitrary comparison between it and the CAB's hypothetical fabrication.

A. The CAB's Findings on Geographic and Commodity Coverage Are Unsupported by Record Evidence and Based Solely on Impermissible Speculation and Conjecture.

In its 1955 Airfreight Forwarder Investigation, supra, the CAB held that "there can be no sound basis for disturbing the present status of REA" because, with REA's virtually limitless commodity and geographic scope "transcending the airfreight forwarder operations concentrated in the larger metropolitan centers," Air Express was indispensible and irreplaceable. Id. at 630.

Against the backdrop of this unequivocal finding, the CAB was required in this case to point to hard evidence showing that the incomparable commodity and geographic coverage offered by REA has withered away or that it is no longer necessary to the "public interest." Yet, the Board has largely failed to make findings on these points, and even where a half-hearted effort was attempted, the Board has substituted speculation and conjecture for evidentiary support in the record.

For example, the Board's ultimate conclusion on geographic coverage, that few communities "would go unserved as a result of the termination of air express" (J.A. 680(a)), is flatly contradicted by overwhelming evidence, the detailed factual findings of the Administrative Law Judge,

and even the CAB's own statements. Thus, the record is clear that over 200 of the nation's 524 airport cities (all of which are now served by Air Express) receive no air freight forwarder service at all. */ Moreover, the number of cities served by REA offices and agencies "far exceed the number of cities and towns covered by the single carrier, door-to-door services of any freight forwarder" (J.A. 606(a); 1686(a) - 1689(a)). **/

Faced with this undisputed record evidence, the CAB itself finally conceded that "gaps in geographic coverage will result from the termination of air express" (J.A. 681(a)), and that "uncertainties are inevitable in the days ahead for air cargo service to small communities" (J.A. 671(a)),

To overcome this inevitable concession, the Board speculates that many of the recognized gaps in geographic coverage will be filled by freight forwarder expansion. Since the record is devoid of hard evidence on which to base this prophecy, the CAB must point only to the self-serving statements of air freight forwarders regarding

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*/ (J.A. 1200(a) - 1221(a); 1286(a) - 1294(a); 1690(a) - 1693(a); 625(a)).

**/ The CAB's findings that "forwarders have ample regulatory authority to offer nationwide geographic coverage" (J.A. 681(a), emphasis added) is meaningless unless and until that authority is exercised. Thus, the findings of the Administrative Law Judge in this regard remain unchallenged.

possible future plans for expansion, along with the bald assertion that "air cargo industry economics make it most likely that those plans will bear fruit" (J.A. 681(a) - 682(a)).

The hollowness of the CAB's position is manifest, however, from the decision of the Administrative Law Judge, who quite properly discredited and rejected the claims of forwarders as unsupported by the evidence. The Board cannot simply reject this credibility determination by the Administrative Law Judge, especially where, as here, the economic evidence is uncontradicted. Thus, based on a comparative analysis of fully allocated costs of service, the Administrative Law Judge determined that there are "substantial economies" inherent in the Air Express Service (J.A. 624(a)), and that "[a]ir freight forwarder service is not endowed with the favorable economics of the single ground agency concept" (Ibid.). Since there is no counter-evidence in the record, the CAB's "ivory tower" theorizing as to "industry economics" must be rejected.

Even if the Board's approach to geographic coverage were supportable (which it plainly is not), its fanciful attitude toward REA's unequaled commodity coverage is even more far-fetched. For the CAB expressly admits, as it must, that there are some 18 commodities which even the larger

freight forwarders do not carry and which now move exclusively via Air Express. (J.A. 683(a)). Yet. "[a]s to the future," the Board guesses that airline airfreight and air freight forwarders will expand their services to cover some of these items. (J.A. 684(a) - 685(a)). But again the problem with the Board's position is that it has undertaken no economic inquiry into either the likelihood or feasibility of such expansion, but instead is content to rest with grandiose statements of the forwarders disbelieved by the Administrative Law Judge. */

In contrast to the CAB, the Administrative Law Judge looked long and hard at the economics of Air Express and, based on this evidence, found that REA's uniform and "virtually unlimited" commodity coverage could not be replaced or duplicated.

In short, the CAB's findings and conclusions with respect to geographic and commodity coverage are legally invalid for two independent reasons. First, the CAB improperly allowed speculation and conjecture to take

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*/ Thus, the CAB relies on the forwarders' statements that "they plan to provide similar services [carriage of live animals and birds] of their own" (J.A. 684(a)) and Emery's claim that "it would provide [security] service if the express category of freight is abolished" (Ibid.).

the place of hard factual evidence. Kivitz v. SEC, 475 F.2d 956, 961 (D.C. Cir. 1973); see Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 642 (D.C. Cir. 1973). And second, the Board erroneously rejected without explanation or discussion the detailed findings of the Administrative Law Judge, who heard all the forwarders' self-serving statements and properly determined that they simply were not credible in the face of the overwhelming economic evidence in the record. NLRB v. Majestic Weaving Co., supra; Braniff Airways, Inc. v. CAB, supra; In re United Corp., supra; Greater Boston Television Co. v. FCC, supra.

The simple, practical fact is that, whatever the CAB's prophecies as to the future, thousands of shippers now will suddenly be deprived of the only air transportation service reasonably adapted to their geographic and commodity needs. Such a result, difficult enough to accept even if the record evidence were in substantial dispute, plainly should not be sanctioned by this Court when, as here, the Board's decision is unsupported by any, let alone substantial, evidence in the record.

B. The CAB's Dream That a New Priority Service Will Emerge to Replace Air Express Denied REA Its Rights of Confrontation and Administrative Due Process.

The record clearly establishes the public need for low-cost, expedited air transportation service, based on the aircraft space priority now provided by Air Express. The record is replete with the testimony of shippers emphasizing their reliance on Air Express for dependable and expedited service. (J.A. 613(a) - 618(a)).*/ For example, the importance of aircraft priority is evidenced by the fact that in a single non-peak traffic week some 650 flights left cargo behind because of full cargo holds. (J.A. 624(a)). As found by the Administrative Law Judge, this figure would be considerably magnified during the holidays and other peak periods. (J.A. 639(a)).**/ Moreover, as the CAB itself concedes, in the circumstances of the present fuel shortage and flight cutbacks, "REA's exclusive claim to priority service could become a matter of real significance. . ." (J.A. 797(a)).

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*/ The various surveys cited by the CAB (J.A. 677(a) - 679(a)) demonstrate that Air Express is as fast as or substantially faster than its air freight forwarder competitors. In analyzing these statistics, the CAB neglects to mention that Air Express was able to achieve this superior performance at almost one-half the cost to shippers. (J.A. 1606(a) - 1609(a)).

**/ The CAB's attempt to dismiss this finding as "speculation" J.A. 679(a)) ignores the fact that it is based on the evidence of the airlines themselves who are presumably fully familiar with their own traffic patterns. (J.A. 1543(a)).

Indeed, as the Board put it: "The evidence before us shows that . . . highly expedited service that gets priority treatment is useful to various shippers, and that they use air express to satisfy these requirements" (J.A. 680(a)), emphasis added). Quite clearly, this is a direct admission that the priority service provided by Air Express serves a real public need. Yet, as with geographic and commodity coverage, the Board can avoid the force of its own admission only by speculation coupled with procedural sleight-of-hand.

Thus, the CAB postulates that the shippers' need for expedited service can best be met through publication of new "high priority tariffs" by airlines. This new priority service, however, exists solely in the CAB's collective imagination, with such questions as exactly how it will operate, what commodities it will carry, what geographic points it will serve, and most especially, how much it will cost, never investigated, much less resolved.

Under these circumstances, REA was placed in the impossible position of shadow-boxing with the apparition of non-existent and untested "high priority" tariffs conjured up by the Board. For without any opportunity for REA to introduce rebuttal evidence and build a record on the

issue of "high priority" airline tariffs, the CAB's actions necessarily violate all principles of fairness and due process in administrative decision-making. See Morgan v. United States, 304 U.S. 1 (1937); Willner v. Committee on Character, 373 U.S. 96, 105 (1963); FTC v. National Lead Co., 352 U.S. 419, 427 (1957).

The CAB compounded this error when it subsequently segregated all proceedings concerning the new priority service into a separate docket and excluded REA and the shipping community from any meaningful participation. In essence, the CAB has removed the crucial issue from the Service case and ordered that it be decided in the context of a wholly separate and patently unfair ex parte proceeding. See Moss v. CAB, supra (invalidating an attempt by the CAB to take rate-making action following closed sessions with carrier representatives and without statutory public hearings). Since by definition there can be only one "priority" service to the exclusion of all others, the most appropriate procedure for establishing such a service would be a full comparative hearing where the needs of shippers would be properly examined and all proposals evaluated on their relative ability to provide maximum satisfaction of shipper needs. See Ashbacker Radio Co. v. FCC, 326 U.S. 327 (1945); Delta Air Lines v. CAB, 375 F.2d 632, 637 (D.C. Cir. 1959), cert. denied, 362 U.S. 969.

What is more, wholly apart from their procedural invalidity, the Board's ex parte airline discussions have yet even to propose a priority service replacement for Air Express. Thus, during the almost eight months since the CAB ordered the death of Air Express and directed the filing of coordinated priority tariffs, the only tentative suggestion so far advanced calls for a single organization to act as ground agent in the handling of priority shipments. Such a replacement service would be almost identical to Air Express, except perhaps in the area of rates, which, according to the individual priority tariffs so far filed with the CAB, would price this new service some 30 percent higher than existing airline airfreight rates, which in turn are substantially higher than present Air Express charges.

In sum, the CAB has terminated Air Express on little more than the dream that the airlines (and perhaps freight forwarders) might someday develop a better means of performing the needed "priority" service now furnished by Air Express. At this same time, however, the Board has transferred the question of how this could be accomplished to a separate, ex parte proceeding which has scarcely progressed beyond the initial conceptual stage. Under these circumstances, the Court should reverse the CAB's decision, halt the ongoing ex parte proceeding, and force the Board to

face the critical issue of the comparative economics of Air Express, expanded air freight forwarder service, and a new high priority airlines tariff in the open air of a new public proceeding.

CONCLUSION

For the reasons set forth above, the CAB orders involved in this appeal should be set aside and the Board should be instructed by this Court:

(a) To determine the economic issues relevant to Air Express, including the comparative economics of Air Express rates and other air cargo rates, before reaching any conclusions with respect to the future of Air Express service;

(b) To insure that all parties, including REA, have an opportunity for an on-the-record comparative hearing with respect to any priority service posed as an alternative to Air Express; and

(c) To avoid any action which would threaten the collapse of REA and to carry out its statutory obligation

to place REA's Air Express opertion on a sound economic basis as sought by REA's original Petition and Complaint.

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ADDENDUM

Section 101(3) of the Federal Aviation Act, 49 U.S.C. §1301(3).

"Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: Provided, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

Section 102 of the Federal Aviation Act, 49 U.S.C. §1302.

In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such a manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and tc improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Section 412(b) of the Federal Aviation Act, 49 U.S.C. §1382(b).

The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it.

Section 1002(e) of the Federal Aviation Act, 49 U.S.C. §1482(e).

In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the Board shall take into consideration, among other factors --

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of October, 1974, caused to be served, by first-class mail, postage prepaid, copies of the foregoing Brief for Petitioner REA Express, Inc., upon the following:

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